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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1462

Mark White, et al.,
Appellants

v.

Diana Regester,
et al.,
Appellees

Mark White, et al.,
Appellants

v.

Frank A. Escalante,
et al.,
Appellees

Mark White, et al.,
Appellants

v.

James Gaskin, et al.,
Appellees

Mark White, Jr., et al.,
Appellants

v.

Wanda L. Chapman, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Jack Warren, Chairman of the State Executive Committee of The Republican Party of Texas, Franklin R. Sears, C. A.

Holliday, Alan McNeil, Walter Smith, Harrell Z. Browning, Vincent Kemendo, Raul Alphonzo Rios and William C. Davidson, Jr. move that the appeal be dismissed, or, in the alternative, that the judgment of the district court be affirmed.

STATEMENT

This is the second round of the litigation involving the 1970 Texas legislative reapportionment.

1. The litigation began in 1971 in four separate actions in which various plaintiffs claimed that the legislative redistricting scheme for the State of Texas contained constitutionally unacceptable population deviations among the districts for the Texas House of Representatives, that the multi-member districting scheme in eleven counties operated to deny ethnic, racial and political minorities equal access to the political process, and that certain districts for the election of members of the Texas Senate were gerrymandered to deprive racial and political minorities of equal protection of the laws. On December 13, 1971, a three-judge court was convened pursuant to the order of Chief Judge John R. Brown, United States Court of Appeals for the Fifth Circuit, to hear the four cases.

The three-judge court determined that the reapportioned districts did indeed contain impermissible population deviations. It also found that the multi-member legislative districts in Bexar and Dallas Counties

were unconstitutional because they denied Mexican-American and Negro residents of those counties an equal opportunity to participate in the political process of electing State Representatives, and concluded that the senatorial districts under challenge were not constitutionally defective. The court ordered immediate single member legislative apportionment of Bexar and Dallas Counties, but refused to enter any injunction regarding the overall legislative scheme and gave the legislature a further opportunity to reapportion itself. Graves v. Barnes, 343 F.Supp. 704 (W. D. Tex. 1972).

The State sought a stay of the portion of the court's judgment that ordered immediate relief in Dallas and Bexar Counties. The application was denied. Graves v. Barnes, 405 U.S. 1201 (1972). The State then perfected its appeal of the entire case and probable jurisdiction was noted, sub nom. Bullock v. Regester, 409 U.S. 803 (1972). This Court held that the three-judge court erred in determining that the population deviations found to exist were beyond constitutional limits, and affirmed the holding that the multi-member legislative districts in Bexar and Dallas Counties were unconstitutional. White v. Regester, 412 U.S. 755 (1973). Accordingly, the judgment of the three-judge court was affirmed in part and reversed in part, and the case was remanded for further proceedings consistent with the opinion of the Court.

2. At the original hearing of the case in December 1971, the parties agreed that because of time constraints the

testimony regarding individual multi-member legislative districts would be limited to Dallas and Bexar Counties. Upon remand the original plaintiffs presented evidence concerning the remaining counties involved in the original hearing, and petitions in intervention were filed by residents of Tarrant, Travis, Jefferson, Lubbock, Galveston, Nueces, Hidalgo, El Paso and McLennan Counties seeking an injunction ordering immediate single-member reapportionment of the legislative districts in those counties. Three additional suits were filed, two challenging the multi-member legislative district in Tarrant County and one challenging the district in Travis County.

Chief Judge Brown designated the same three judges to hear the newly-filed cases and consolidated those cases for hearing with the pending case. Trial on the merits was held on December 3, 4 and 5, 1973. The plaintiffs were required to file proposed plans for single-member districts in each of the counties on January 11, 1974 and the State was required to do so on January 18, 1974. On January 28, 1974, a hearing was held on the appropriateness of particular single-member legislative districts for the various counties.

In a seventy-one page opinion filed on January 28, 1974, the court below, one judge dissenting, held that the multi-member legislative districts in Tarrant, Travis, El Paso, McLennan, Jefferson, Nueces and Lubbock Counties operated to deny Negro and Mexican-American residents in those counties an equal opportunity to participate

in the political process in those counties (App. A). While the court found that the multi-member districts in Galveston and Hidalgo Counties did not do so, it held that the design of a legislative district, part of which is in Galveston County, constituted an impermissible racial gerrymander (App. 55A). It concluded that immediate single-member legislative reapportionment in Tarrant, Travis, Jefferson, El Paso, McLennan, Lubbock and Nueces Counties was necessary to grant meaningful relief to the plaintiffs, and accordingly adopted a plan for each county (App. 61A-71A). The court did not grant immediate relief in Galveston County, instead giving the legislature until July 1, 1975 to remedy the constitutional defect which it had found.

The State applied for a stay of the order of the court below, and on February 2, 1974, Mr. Justice Powell granted the application (App. C). A motion to vacate the stay was denied by the Court on February 7, 1974, Mr. Justice Douglas dissenting (App. D).

ARGUMENT

This Court has no jurisdiction of this appeal and accordingly the appeal should be dismissed. Alternatively, we contend that the court below correctly determined the issues before it by applying settled principles to the particular facts in this case, and that plenary review of its decision is not warranted.

1. Appellants assert that this Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1253 and §2101(b).

Section 1253 provides that this Court has jurisdiction to review orders in actions "required by any Act of Congress to be heard and determined by a district court of three judges." Under 28 U.S.C. §2281, a three-judge district court is required in any case where an injunction is sought to restrain the enforcement, operation or execution of a state statute that has a statewide impact upon grounds that the statute is unconstitutional. See Moody v. Flowers, 387 U.S. 97 (1967).

There can be no doubt that the first round of this litigation was required under Section 2281 to be heard by a three-judge court, as this Court held in White v. Regester, supra, 412 U.S. at 760. For in the earlier proceeding the Texas legislative reapportionment statute was challenged in its entirety as unconstitutional on the ground that the population variances contained in the statute were too large. This Court disposed of this claim completely by reversing the district court and holding that the population variances were not too large. Id. at 763-64.

At this stage of the case, however, there no longer is any challenge to the statute based on its statewide impact. Appellee's attack on the multi-member districting scheme, both in the earlier proceeding and in the present one, is not against a general state policy, but instead rests on

the claim that the operation of the multi-member scheme in the particular local circumstances of each district involved in the case is unconstitutional. The new cases consolidated with the original case on remand do not alter the situation, as they only make a similar assertion with respect to the reapportion statute in legislative District 32, which consists of part of Tarrant County, and in District 37, which is located in Travis County.

Thus, the only issues now in these cases involve local matters requiring local relief. The evidence regarding each district, and the holding of the court below based thereon, are separate and distinct. There is not even a hint that the relief sought and granted in this round of the litigation would disrupt a statewide policy. The three-judge court was not required to resolve these matters. Consequently there is no jurisdiction in this Court to review the decision below and this appeal should be dismissed. See Board of Regents v. New Left Education Project, 404 U.S. 541 (1972); Moody v. Flowers, 387 U.S. 97 (1967).

We do not suggest that the three-judge court was not properly convened here. Since the panel of judges was familiar with the law and had dealt with the earlier proceeding, wise use of judicial resources suggested that they hear the second round. For this Court to have jurisdiction under Section 1253, however, the proceeding must be one "required" to be heard and determined by a three-judge district court. While the three-judge court was properly convened for this round, it was not "required".

Appellants assert that the jurisdiction of this Court is supported by Swann v. Adams, 385 U.S. 440 (1967); Reynolds v. Sims, 377 U.S. 533 (1964); Whitcomb v. Chavis, 403 U.S. 124 (1971); and White v. Regester, supra. In each of these cases the plaintiffs sought to enjoin a state statute with respect to the entire, statewide apportionment scheme because of allegedly unconstitutional population deviations among the districts. While Whitcomb v. Chavis, like the first round of this litigation, involved the apportionment of individual counties as well as a challenge to the statewide apportionment scheme, as pointed out above the statewide claim no longer is in this case. This Court has never determined that the peculiar operation of a state statute in a few areas--here, involving only seven of two hundred and fifty-four counties--is a proper case for direct review by the Court. On the contrary, in Moody v. Flowers, 387 U. S. 97 (1967) the Court suggested that it is not.

2. At all events, plenary review of the case is unwarranted. The appeal presents no question of law, but only one of the sufficiency of the evidence. The decision of the court below is correct and should be affirmed.

This Court in its decision in the first round of this litigation indicated with precision what must be established to support a claim that multi-member legislative districts are being used to cancel out or minimize the voting strength of racial groups, and hence operate to deny the plaintiffs equal protection of the law. The plaintiffs

must "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the [racial or ethnic] group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, supra, 412 U.S. at 766. In the present proceeding the court below simply applied the evidence offered and determined that the plaintiffs had met that burden. There is no more to the case.

The district court had before it the complete record compiled during the first hearing in this case, which contained a great deal of evidence concerning the history of racial and ethnic discrimination by the State of Texas, the effect of the "place system" on the elective process and the statewide conditions effecting Negroes and Mexican-Americans in Texas. This evidence along with the local evidence of the situation in Dallas and San Antonio was reviewed by this Court in the earlier appeal and was found to be sufficient to sustain the district court's judgment regarding Dallas and Bexar Counties. White v. Regester, supra, 412 U.S. at 766-769.

In the present proceeding the district court had before it not only the record originally compiled, but also evidence presented at three days of hearings, several hundred exhibits and seventeen depositions. The court carefully considered and evaluated this evidence to determine the particular circumstances that exist in each of the multi-member

districts involved and how those districts affect racial groups. The court below found that certain of the multi-member districts in fact operated to exclude racial groups from political processes. These findings, like the ones for Dallas and Bexar Counties, represent the district court's "blend of history and an intensely local appraisal of the design and impact of the [multi-member districts involved] in the light of past and present reality, political and otherwise," and should be sustained. White v. Regester, supra, 412 U.S. at 769-770. See also Mayor of Philadelphia v. Educational Equality League, 42 U.S.L.W. 4405, 4410 n. 20 (March 25, 1974).

The suggestion by Appellants that the court below in some way departed from the standard set by this Court in Whitcomb v. Chavis, 403 U.S. 124 (1971) and White v. Regester, supra, indicates an improper understanding of the decision below. The plaintiffs must show that the State's choice to have a multi-member legislative district rather than a single member district results in unequal access to the political process. There is no requirement, as Appellants seem to suggest (Juris. St. 18-19), that the plaintiffs must also show that the State intended the result; in fact, such a showing would have no relevance. Palmer v. Thompson, 403 U.S. 217 (1971). And the use by the district court of the factors listed by the United States Court of Appeals for the Fifth Circuit in Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973) and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) in summarizing the evidence before it does not indicate that

the court substituted some other standard for the one announced by this Court. The district court used the factors listed in Zimmer and Turner merely as aides to help it digest the volume of evidence that was before it. Such techniques are common and are nothing more than a trial court's effort to give some structure to its attempt to make the "intensely local appraisal" needed.

The State of Texas decided that it would have single-member legislative districts in some counties and multi-member districts in others. The question before the court below was whether that choice deprived Mexican-American and Negro residents of the multi-member districts of equal access to the political process. The court below only dealt with that issue. Appellants' assertion (Juris. St. 17-19) that in doing so the court improperly considered the economic and cultural circumstances of the Mexican-American and Negro residents is insupportable. While the court did consider the "past and present reality, political and otherwise" in the counties involved, that consideration had been cited with approval by this Court. White v. Regester, supra, 412 U.S. at 770. And the consideration of those realities is obviously essential to determine the local effect of the multi-member districts and whether those districts operate to violate the equal protection provision of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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R. JAMES GEORGE, JR.,

Attorneys.

April 1974.